

PUBLIC HEARING -- May 12, 1965

Appeal #8202 Broadmoor Cooperative Apartments, Inc., appellant.

The Zoning Administrator District of Columbia, appellee.

On motion duly made, seconded and carried with Mr. William S. Harps and Mr. Arthur P. Davis dissenting, the following Order was entered at the meeting of the Board on March 4, 1966.

ORDERED:

Effective Date: March 25, 1966

That the appeal of the Broadmoor Cooperative Apartments, Inc. and Braun's Fine Caterers from what appellants characterize as the decision of the Zoning Administrator given on April 9, 1965, in relation to premises located at 3601 Connecticut Avenue, N. W., parcel 56/53 in square 2226, be denied.

In part, the Zoning Administrator's letter of April 9, 1965, treats of the termination of the outside catering service conducted from 3601 Connecticut Avenue by the appellant Braun.

From the records and evidence adduced at the public hearing, the Board finds the following facts:

1. The Broadmoor apartment house was constructed in 1928 as an apartment house pursuant to Permit No. 118,777. Since its opening it has been operated as an apartment house and an apartment hotel. In 1948 it became a co-operative apartment house and has been so operated since then.
2. Prior to May 12, 1958, the zoning district in which the building was located was residential. Since May 12, 1958, the zoning has been R-5-C.
3. Prior to May 12, 1958, certificates of occupancy were issued for an apartment building, dining room, soda fountain, restaurant, apartment hotel and restaurant adjunct in the order listed and, in 1949, a certificate of occupancy was issued to Broadmoor Food Services, Inc. Since May 12, 1958, no certificates of occupancy have been issued for the operation of a catering service at the Broadmoor.
4. No certificate of occupancy or license has ever been for the operation of a catering service at the Broadmoor.
5. Prior to May 12, 1958, the Zoning Regulations did not permit a catering establishment in any residential district as those regulations enumerated the uses permitted in the residential district and excluded all other uses. A catering service was not one of the enumerated uses.
6. Prior to May 12, 1958, it would not have been possible to secure a certificate of occupancy or a license for the operation of a catering service at the Broadmoor.

7. After May 12, 1958, the Zoning Regulations permitted the establishment and operation of a catering service only in C-2 and less restricted zoning districts. After May 12, 1958, neither a certificate of occupancy nor a license could have been secured for the establishment or operation of a catering service at the Broadmoor.

8. A restaurant has been continuously operated at the Broadmoor from at least 1930 to the present time.

9. It is appellant's contention that (1) prior to May 12, 1958, "a catering establishment, as used in the Zoning Regulations, was a use recognized by the District of Columbia as an adjunct or incident to a restaurant use", (2) that affidavits provided by appellant show that prior to May 12, 1958, a restaurant and catering service had been continuously operated at the Broadmoor, and (3) that the catering service use prior to May 12, 1958, was "existing and lawful, being lawful because it was a recognized adjunct to a lawful restaurant use."

10. The Zoning Administrator contends that there could have been no legal use or occupancy at the Broadmoor by a catering establishment prior to May 12, 1958; that any such use prior to that date was illegal; and that any such use after May 12, 1958, cannot therefore be a nonconforming use. This contention is supported by the decision of the United States District Court for the District of Columbia in Jo-Pra, Inc. vs. Ilgenfritz, et als., decided by Judge Robinson on April 22, 1964, in which the following appears:

"The burden was upon the plaintiff, however, to establish such prior use as the statute and the regulation specify. This necessitated demonstration not only that such use commenced prior to the effective date of the 1958 regulations, but that it also satisfied legal requirements. The statute is explicit in its requirement that the use must then be both existing and lawful, and the regulation equally positive that it then be lawfully existing."

11. The testimony and affidavits on behalf of appellant tend to establish that a catering service has been continuously operated at the Broadmoor since 1937.

12. The testimony and the affidavits entered into the record in opposition to appellant tend to show that there was at least an hiatus in the operation of a catering establishment at the Broadmoor prior to May 12, 1958, which hiatus existed from 1949 to 1954.

13. Appellant has not supported the burden placed upon it by the decision of the United States District Court for the District of Columbia as set forth above. In particular, it has not established that there was a continuous, un-interrupted operation of a catering establishment at the Broadmoor from 1930 to May 12, 1958, nor has it establish that such use was legal.

14. The certificate of occupancy for the restaurant was first issued for a restaurant on July 26, 1933, numbered 42548. The Certificate of Occupancy for the apartment-hotel was first issued on July 27, 1934, numbered 44411. Inasmuch as the restaurant permit preceded the apartment-hotel permit, the restaurant cannot be considered as an adjunct to an apartment-hotel.

OPINION:

We are of the opinion that there was no legal catering service use at the Broadmoor during any period prior to May 12, 1958, for the reason that any legal use other than that of a single-family dwelling must have a Certificate of Occupancy, and no such Certificate was ever issued for a catering service at the Broadmoor prior to May 12, 1958, nor could one have been issued under the Zoning Regulations in effect prior to that date.

For this reason, the decision of the Zoning Administrator was correct and is affirmed.

By William S. Harps and Arthur P. Davis:

The findings of fact contained in the majority opinion are concurred in by us with interpretations and comments as indicated below. The comments are keyed to the numbers of the facts in the majority opinion:

3. Since May 12, 1958, Occupancy Permit No. A 1313 was issued for a hotel restaurant comprising a kitchen and dining room seating less than 75 persons. The Permit was issued to Broadmoor Food Services, Inc.

5. - - - - however, uncontradicted testimony of the appellant at the hearing was to the effect that catering was permitted under a Certificate of Occupancy for a Restaurant.

13. Testimony and affidavits with regard to the continuity of the catering operation were conflicting.

OPINION:

We are of the opinion that a legal catering service as an adjunct to the restaurant use was established at the Broadmoor prior to May 12, 1958, by reason of the Certificate of Occupancy for a restaurant and the uncontradicted testimony of the appellant that a catering service was permitted under a certificate of occupancy and license for a restaurant. Further, inasmuch as no certificate of occupancy or license for a catering service could have been issued because there was no such category in the regulations, *Jo-Pra, Inc. vs Ilgenfritz*, at al has no strict application. Legality of the use could not be established by a permit inasmuch as no such permit classification was in existence. In our opinion, the catering use was legal, but nonconforming. As a nonconforming use expansion was not and is not permitted under the regulations without the approval of the Board of Zoning Adjustment under section 8207.11. No such approval has been granted. Further, the catering use

was originally incidental to the restaurant use, was primarily intended to serve the residents of the Broadmoor in their apartments, and secondarily intended to serve neighbors. Uncontradicted testimony by the opposition to the appellants clearly indicated that the catering use is now the primary use. Advertisements in the Yellow Pages of the Telephone Book show a one line advertisement for a restaurant and six and one-half inches in two display advertisements for Braun Fine Caterers. The nonconforming use has been illegally extended. The catering use is legally nonconforming only to the extent it existed at the time of the first restaurant permit when the catering use was incidental to the restaurant use, and inasmuch as no testimony was adduced at the hearing to indicate the exact extent of the catering use originally, the legal nonconforming use as a catering establishment should be limited to the space described in Certificate of Occupancy No. A1313, described in No. 3, above.

For the above reasons the Zoning Administrator was in our opinion partially in error and partially correct and should take immediate steps to see that the catering use is confined to its original minor role in the restaurant operation.

Before the Board of Zoning Adjustment, D. C.

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The Zoning Administrator District of Columbia, appellee.

Upon motion duly made, seconded and unanimously carried, the following Order was entered at the meeting of the Board on April 27, 1966.

EFFECTIVE DATE OF ORDER -- May 4, 1966

ORDERED:

That the petition for rehearing be denied.

That the Order of the Board, effective March 25, 1966, be amended by the addition of the following paragraph to the opinion ~~of~~ the majority:

The relief requested cannot be granted without substantial detriment to the good of the public involved in the case nor can it be granted without substantially impairing the intent, purpose, and integrity of the zoning plan as embodied in the Zoning Regulations and Map.

Mr. Arthur P. Davis and Mr. William S. Harps, who dissented from the original Order, assent to the foregoing paragraph.